

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**REBECCA L. BAGBY**  
Claimant

VS.

**PRAIRIE VILLAGE ANIMAL HOSPITAL, P.A.**  
Respondent

AND

**TRAVELERS INSURANCE COMPANY**  
Insurance Carrier

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Docket No. 1,020,548

**ORDER**

Respondent appeals the April 27, 2005 preliminary hearing Order of Administrative Law Judge Steven J. Howard. Claimant was awarded medical treatment with the parties to agree upon a specialist to treat claimant's shoulder condition. Respondent was ordered to pay the cost of an MRI. Temporary total disability was taken under advisement pending an updated report from the specialist. Respondent disputes claimant's entitlement to benefits, arguing error on the part of the Administrative Law Judge (ALJ) for not consolidating this case with another case involving claimant and a different respondent and further in not finding that claimant suffered an intervening injury.

**ISSUES**

Specific issues raised by respondent in its Application for Review before the Workers Compensation Board (Board) are as follows:

1. Whether there was an error by the Administrative Law Judge in not allowing the joining of the two cases involving Ms. Bagby for preliminary hearing purposes. That the other case involving Ms. Bagby was against the Courtyard Café under Docket No. 1,020,939 and involved a claimed aggravation to her original injury at Prairie Village Animal Hospital, P.A. That the claimant's attorney did file a notice of consolidated preliminary hearing setting both cases at the same time, however, the Administrative Law Judge

would only take up the case against Prairie Village Animal Hospital at the preliminary hearing. The Courtyard Café did receive a notice of the hearing date but did not appear at the preliminary hearing.

2. Whether the claimant's present problems from her claimed job related injury arose out of and in the course of her employment with Prairie Village Animal Hospital or whether her problems resulted from aggravations while working at the Courtyard Café or from other aggravating activities after she left the employment of Prairie Village Animal Hospital, P.A.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed in part and dismissed in part.

Claimant, a veterinary technician for respondent, worked in that capacity for approximately two and a half years. On August 16, 2003, while lifting a very heavy dog, claimant felt a sensation in her right shoulder, which claimant testified grew progressively worse. She was initially treated by Dale Scott, D.C., but was then referred to orthopedic surgeon Andrew R. Scott, M.D., at the Orthopaedic & Sports Medicine Clinic of K.C.<sup>2</sup> Claimant was treated conservatively, with physical therapy and injections into her shoulder. Claimant received some relief from the conservative treatments, and by February 19, 2004, Andrew R. Scott, M.D., found claimant to have a full range of motion of the shoulder, although she did experience occasional popping in the shoulder and noted that her right shoulder fatigued more easily than the other. Claimant also had a minimally positive supraspinatus stress test. Claimant was recommended for long-term rotator cuff strengthening, but assessed a zero percent impairment to the right upper extremity at the level of the shoulder for the August 16, 2003 injury.

Claimant continued working for respondent through March of 2004, at which time she was terminated, with the termination having no relation to claimant's shoulder injury. Claimant sought employment from March of 2004 through August of 2004. During this period, she spent two days helping her husband paint the inside of her house, which

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<sup>1</sup> Application for Review at 1-2.

<sup>2</sup> Claimant was treated by three health care providers in this matter, all with the last name of Scott. The first, Dale Scott, is a chiropractor; the second, Andrew R. Scott, is an orthopedic surgeon/MD; and the third, Sherri L. Scott, is a chiropractor and the ex-wife of the first chiropractor, Dale Scott.

activity aggravated her shoulder. After the painting ceased, claimant's shoulder pain returned to its pre-painting symptom level. She also attempted swimming upon the recommendation of her second chiropractor, Sherri L. Scott, D.C., with the swimming lasting two times a week for two weeks. This also increased her pain in her shoulder and claimant ceased the swimming activity after two weeks, with the symptoms returning to their pre-swimming level. Claimant testified that her pain increased with activity and then would reduce when she ceased the activity.

Claimant returned to Andrew R. Scott, M.D., on October 25, 2004, with increased pain, soreness, fatigue and popping in the shoulder, in particular in the shoulder blade area. A repeat MRI was performed, and claimant was placed on a 5-pound lifting limit. The MRI displayed a buildup of fluid in the muscles and chronic tendinitis. Claimant was again treated with injections and physical therapy, and surgery was discussed, although not performed. Claimant again noted that the ongoing difficulties with her shoulder waxed and waned with activity.

On August 12, 2004, claimant obtained employment with the Courtyard Café as a waitress. Claimant primarily spent her time serving coffee and pastries, which she considered to be light work. However, this activity increased her shoulder pain to the point where on November 12, 2004, claimant ceased her employment with Courtyard Café.

Claimant contends she is in need of additional medical care stemming from the August 16, 2003 accident with respondent. Respondent, on the other hand, contends that claimant's intervening activities from painting, swimming and employment with Courtyard Café constitute intervening accidents, which would relieve respondent of any responsibility for this ongoing shoulder condition.

In preparation for the preliminary hearing, claimant's attorney filed with the court a Notice of (Consolidated) Preliminary Hearing. This Notice carried both the docket number in this matter and in *Rebecca L. Bagby v. Courtyard Café and Midwestern Indemnity Company*, Docket No. 1,020,939, the case filed by claimant against the Courtyard Café when her shoulder symptoms increased while working there. The respondent in this matter, Prairie Village Animal Hospital, P.A., appeared at the hearing with counsel. However, the Courtyard Café failed to appear at the hearing. At the time of the preliminary hearing, the ALJ announced that this case and the companion case with Courtyard Café had not been consolidated for the purposes of the hearing. The only indication of a consolidation was the notation on claimant's attorney's notice of hearing. There is no order in the file indicating that the ALJ, at any time, consolidated these matters. Respondent contends the ALJ erred in continuing the hearing without allowing or mandating the presence of Courtyard Café, the other respondent in this claim.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>3</sup>

Additionally, the Board may review those preliminary hearing orders where it is alleged that a judge has exceeded his or her jurisdiction or authority.<sup>4</sup>

An administrative law judge's order regarding the consolidation or refusal to consolidate cases is an administrative decision within the administrative law judge's jurisdiction. This interlocutory order is merely an administrative law judge managing his or her docket, which is well within his or her authority. The Board does not find that the ALJ exceeded his jurisdiction in refusing to consolidate the matters above discussed. The Board, therefore, does not have jurisdiction to review this matter, and respondent's appeal of this issue is, therefore, dismissed.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup> In this instance, claimant alleges ongoing difficulties with her right shoulder for a recognized injury of August 16, 2003. Respondent's defense is that claimant suffered intervening aggravations while painting, swimming and working at a second job. However, claimant's testimony is that while her condition would worsen during these activities, afterwards the problem would return to its pre-activity level. The medical evidence contained in the file, including reports from Andrew R. Scott, M.D., and Sherri L. Scott, D.C., supports claimant's contention that her difficulties stem primarily from the August 16, 2003 accidental injury with respondent.

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<sup>3</sup> K.S.A. 44-534a(a)(2).

<sup>4</sup> K.S.A. 2003 Supp. 44-551.

<sup>5</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

At the time of Andrew R. Scott, M.D.'s last evaluation of claimant in February of 2004, claimant had occasional popping, with a minimally positive supraspinatus test, and claimant's right shoulder fatigued more easily than the other. Dr. Scott's next examination of claimant in October of 2004 indicated that claimant's altered shoulder mechanics from the rotator cuff tendinitis is contributing to her scapular pain. Sherri L. Scott, D.C., who examined claimant on March 10, 2004, found claimant's current condition to be the result of the injury sustained while working for "the veterinarian." Sherri L. Scott, D.C., stated that this was the result of an injury that did not heal properly.

The Board finds that the medical evidence in this file, coupled with claimant's testimony, supports a finding that claimant's current symptoms stem from her initial August 16, 2003 accident with respondent. The intervening incidents discussed by claimant in the record were of a temporary nature. The Board, therefore, finds that the Order of the ALJ granting claimant medical treatment at respondent's expense, with the parties to agree upon a specialist to treat claimant's shoulder condition and respondent to pay the cost of the MRI, should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated April 27, 2005, should be, and is hereby, affirmed with regard to the issue of whether claimant suffered accidental injury arising out of and in the course of her employment with this respondent or whether she suffered a subsequent intervening injury. Respondent's appeal regarding the Administrative Law Judge's failure or refusal to consolidate this matter with its companion case is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2005.

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BOARD MEMBER

c: Timothy V. Pickell, Attorney for Claimant  
Bryce B. Moore, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director